

Colquest Energy, Inc. and United Mine Workers of America, AFL-CIO. Cases 10-CA-25168-1 and 10-RC-14023

October 29, 1993

SUPPLEMENTAL DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issue presented in this case is whether employees Rick Foust and Delbert Buckner were agents of the Union and interfered with employee free choice in the election by threatening eligible voters.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, to certify the Union as the employees' bargaining representative, and to reaffirm its Order in 302 NLRB No. 166 (May 15, 1991) (not reported in Board volumes).

ORDER

The National Labor Relations Board reaffirms the Order in 302 NLRB No. 166 (May 15, 1991), and orders that the Respondent, Colquest Energy, Inc., Clairfield, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of valid ballots have been cast for United Mine Workers of America, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees, including carrier operators, utility employees, shop employees, roof bolters, fire bosses, laborers, mechanics, tractor operators, miner operators, and maintenance employees employed at the Employer's facilities (Mines #1, #2, #3 and Machine Shop) in Clairfield, Clairborne County, Ten-

nessee; EXCLUDING: All clerical and professional personnel and supervisors as defined in the Act. Also excluded are independent truckdrivers.

Ronald Ramsey, Esq., for the General Counsel.
Robert Ouillen and *Herbert Sanger Jr., Esqs.*, for the Respondent/Employer.
Robert Weaver, Esq., for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard in Knoxville, Tennessee, on March 1, 1993.

The petition for election among the Employer's production and maintenance employees was filed by the United Mine Workers of America, AFL-CIO (UMW) on May 18, 1990. Election was held on June 29, 1990, with the following results: eligible voters 75, votes cast for the Petitioner 39, votes cast against the Petitioner 30, challenge ballots 6, and valid votes plus challenges 75.

On July 6, 1990, the Employer filed timely objections to the election which were overruled in a report or objections issued by the Region on August 31, 1990. The Region in that report also certified the UMA as the bargaining representative of the Employer's employees.

On January 18, 1991, the Board adopted the Region's findings and recommendations and certified the UMW as the bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees, including carrier operators, utility employees, shop employees, roof bolters, fire bosses, laborers, mechanics, tractor operators, miner operators and maintenance employees employed at the Employer's facilities (Mines #1, #2, #3 and Machine Shop) in Clairfield, Clairborne County, Tennessee; Excluding: All clerical and professional personnel and supervisors as defined in the Act. Also excluded are the independent truck drivers.

On March 18, 1991, the Region issued a complaint alleging violations of Section 8(a)(1) and (5) of the Act because Respondent refused to recognize and bargain with the UMW. On April 11, 1991, the Region followed up with a Motion for Summary Judgment which was granted by the Board on May 15, 1991 (302 NLRB No. 166) (not reported in Board volumes).

Thereafter, Respondent filed a petition for review with the United States Court of Appeals for the Sixth Circuit and the Board cross-petitioned for enforcement of its Order. On June 2, 1992, the court granted Respondent's petition for review holding that Respondent was entitled to a hearing on its Objection 3 which was filed in the representation proceeding. On November 6, 1992, the Board accepted the remand and ordered a hearing for the limited purpose stated in the court's opinion.

Objection 3 reads as follows:

Employee free choice was interfered with by the UMW as a result of threats by agents of the UMW made to

¹ On July 14, 1993, Administrative Law Judge Hubert E. Lott issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief to the answering brief filed by the Charging Party.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further contends that the judge's findings are tainted with bias and prejudice against the Respondent. We find this allegation to be without merit. Our review of the record and the judge's decision reveals no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias.

employees of the employer eligible to vote in the election.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing, briefs have been received from the parties.

On the entire record, and based on my observation of the demeanor of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is at all times material, a Tennessee corporation with an office and place and business located in Clairfield, Tennessee, where it is engaged in the mining and sale of coal. Respondent, during the past calendar year, which period is representative of all times material, sold from its Clairfield, Tennessee mines coal valued in excess of \$50,000 directly to Copper-Glo Fuels, Inc., within the State of Tennessee. Copper-Glo Fuels, Inc., a West Virginia corporation with an office and place of business located in Clairfield, Tennessee, from which it is engaged in the processing and sale of coal, during the same period, sold and shipped from its Clairfield, Tennessee plant, coal valued in excess of \$50,000 directly to customers located outside the State of Tennessee.

The Company admits, and I find, that it is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the parties admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. OBJECTION 3

In support of its objection, the Employer offered two witnesses.

Sam Perry testified that he worked as a flyboy in the mine from 1 year before the union campaign until September 1990. He was part of a section crew in mine 1 with 12 other miners. Perry testified that early in the campaign several employees wore UMW hats and stickers including Rick Faust who worked in Perry's crew. Perry asserts that sometime Faust told him that he was sent out to organize the Company. He stated that Lonnie Boshears, Danny Muse, and Faust were active in getting employees to sign union cards. Faust also talked in favor of the Union telling employees that if they did not vote the Union in they would probably lose their jobs and that the Union offered them job protection.

Perry admitted that he told the other employees that they did not need a union, that if the Union won the election, they would lose their jobs. Perry claimed that everyone knew how he felt about the Union.

Perry further testified that sometime either June 16 or 6, 1990, he was in the mine alone with Faust when Faust told him they needed the Union. Perry disagreed and Faust then said, "Don't you know that your house could burn." Perry replied that he had insurance and laughed it off.

Faust also told him that he waited alone down on the highway (waiting for a ride to work) and something could happen to him.

Later that day in the "dinner hole" with the whole crew present, Perry called Faust a union steward and Faust agreed repeating his threat that Perry's house could burn. An argument ensued and Face Boss Don Kennedy broke it up.

Faust testified that he did not call the police because Union Representative Freddy Wright had mentioned in a meeting a week or two before the election that the Union had a judge and sheriff under the Union's control and nothing would happen to the members if they were arrested. Instead he bought a gun. The same day the threats were made, Perry related them to another employee, John England, who rode with him. He also told his family and Assistant Supervisor Dwayne England about the threats.

After the threats were made, he attended a union meeting at Careyville Holiday Inn (no date given) where Freddy Wright cautioned all employees not to make threats and told them about an election he lost because someone threatened to burn down an employee's house. At a second meeting he attended a week before the election at Jellico Holiday Inn, Wright again cautioned employees not to threaten anyone.

In his affidavit he admitted that Faust never said he was a union steward. He also stated in his affidavit that after the threats, he and Faust remained friends and talked daily. He testified that he thought Faust was warning him about what someone else would do to him, but the Board agent did not put it in the affidavit. He further stated in his affidavit that the threats were made on June 5, 1990. He testified on cross that he signed a union authorization card before the election, at the first union meeting held at Perryville Holiday Inn. His union authorization card was offered into evidence and is dated July 2, 1990.

He finally testified on cross that when the Southern Labor Union represented the employees at Colquest, he opposed it, and on redirect he stated that although he initialed and signed his Board affidavit, he did not have his eyeglasses with him, so he was not able to read it.

Leon Jeffers testified that he worked for the Employer during 1990 as a roof bolt operator in section 2 with 10 other employees and he left the Company before the strike started on October 1, 1990. He drove a Volkswagen to work with employees Kenneth McCormick and Mike Martin.

He testified that crewmembers Delbert Buckner (Bo) and Carl Morgan talked in favor of the Union and a couple of weeks before the election, at the dinner hole in front of other crewmembers, Buckner told Morgan there would be a special meeting at the White Oak fire department. Jeffers testified that sometime in May or June, a week or two before the election in the dinner hole in front of the whole work crew, Buckner asked him how he would vote. Jeffers said he would probably vote against the Union. Buckner then stated to Jeffers that his mind could probably be changed. Somebody might overturn your car. He stated that he probably mentioned the threat to the employees he rode with and his wife.

On cross-examination, Jeffers admitted that he worked with Buckner everyday after the threat and they talked to each other but he never mentioned the threat to Buckner. He also stated that after the election and the allegation was made, Buckner talked to him about it and said he was not mad at Jeffers.

For the Union, International Representative Freddy Wright testified that he had no special committees of supporters or

an inplant organizing committee. Neither Faust, Buckner, Muse, or Morgan had any special status with the Union and had no authorization to do anything other than be members of the bargaining unit. No one received money from the Union other than strike benefits. Wright did not know who Faust and Buckner were at the time the objections were filed. He further states that they held no position with the Union.

Wright testified that he had several informal meetings with employees by the side of the road and two formal meetings at Cove Lake and Jellico. The first meeting was held around the first of June (June 3) and the second meeting was held around June 24. At these meetings he instructed the employees not to make threats and gave two instances where he had elections overturned at Sequestchie Valley Company in southern Tennessee and Brownie Street Collieries in Kentucky where an employee threatened another that his house could burn and the other involved a threat to overturn an employee's Volkswagen. Sam Perry was present at the meeting where these other elections were discussed. He remembers that Perry was present because he signed a union card at the meeting, which was the only union card to be signed after the petition was filed. Perry also talked to Wright at the time he signed the authorization card.

Delbert Buckner testified that he worked for Colquest up to July 1990. He was not active in the campaign, held no position in the Union and was not paid any money by the Union. He attended all the union meetings where Wright told employees not to threaten anyone.

He stated that he found out about the alleged threat to turn over Jeffers' Volkswagen from Wright. That same day, he called Jeffers and asked why he made the allegation. Jeffers replied, "Bo, I'm sorry, I was pressured into it by the company." Jeffers apologized to Buckner who said, "Leon, you know I wouldn't do anything like that." Jeffers replied, "I know it, I was just pressured into it."

Rick Faust testified that he worked with Perry at Colquest and remained there until the strike on October 1, 1990. He stated that he was for the Union but he held no special job in the campaign. He was never on any committee and was never paid by the Union. He was not a union steward but Perry called him that. He further testified that he never threatened Perry or tried to change his mind about the Union. He stated that sometimes Perry was for the Union and sometimes he was against it; however, he did tell Faust that he got the Southern Labor Union out of Colquest and he would get the UMW out. He further testified that after a union meeting at Jellico, Perry asked him if an election could be overturned if somebody claimed their house got burnt. Perry attended the meeting when this incident was discussed because Perry wanted Faust to buy him some Kentucky Fried Chicken after the meeting.

Karl Morgan testified that he worked with Jeffers and he never heard Buckner threaten Jeffers.

Danny Muse testified that he worked with Perry and Faust at Colquest and he never heard Faust threaten Perry. He further testified that Perry told him that he was the one that initiated the petition to get rid of the Southern Labor Union and that if the UMW was voted in, the Company would not accept it and they would be out of a job. He testified that he attended union meetings where Freddy Wright talked about not threatening others. Wright did mention a house burning threat and a threat to overturn an automobile.

Analysis and Conclusions

After observing the witnesses and listening to their testimony, I can only arrive at one credibility resolution. The Employer's witnesses were deceptive, evasive, and their testimony was completely fabricated. It is much more than a coincidence that their alleged threats exactly matched what Wright stated, at the union meetings, was sufficient to have an election overturned.

I credit all the Union's witnesses when they stated that they did not threaten Perry or Jeffers and I credit Buckner when he testified that Jeffers told him the Company pressured him into alleging he was threatened. I further credit union witnesses when they testified that Perry was antiunion and told them he was instrumental in getting rid of another union and would do the same to the UMW. Perry showed bias throughout his testimony and the Union's witnesses corroborated his bias against the Union. Perry's reasons for not calling the police and not reading his Board affidavit are preposterous.

Another major reason for discrediting the Employer's only two witnesses is that their testimony was uncorroborated. According to their own testimony, dozens of crewmembers, as well as supervisors, heard these threats but no one was offered to corroborate their testimony. Moreover, they testified that they repeated these threats to other employees, supervisors, and family members but not one was offered for corroboration.

The credible evidence supports the finding that none of the Colquest employees were agents of the UMW. Although the Employer's objection refers only to agents of the UMW; in brief, it apparently wants me to consider third-party conduct as well. The Company should have alleged third-party conduct, if it wanted it considered. Moreover, it should have offered the testimony of the many witnesses available to it to support its contention and corroborate its two witnesses but it did not. Therefore, the presumption is that if they had called other witnesses, they would not have supported its third-party assertion. Having already discredited their only two witnesses, I find that no threats were ever made.

Employer's counsel complains about my disallowing an offer of proof. There was sufficient offer of proof on the record for me to decide that it would be inappropriate to retry the Yablonski murder case.

In conclusion, I recommend overruling Employer's objection to Objection 3 and certifying the UMW. It is further recommended that the Board find Respondent in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent/Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including carrier operators, utility employees, shop employees, roof bolters, fire bosses, laborer mechanics, tractor operators, mine operators and maintenance employees employed at the Employer's facilities (mines #1, #2, #3, and machine shop) in Clairfield and Clairborne County, Tennessee; excluding: All clerical and professional personnel and supervisors as defined in the Act, also excluded are the independent truck

drivers constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Employer's Objection 3 should be overruled in its entirety.

5. United Mine Workers of America, AFL-CIO is the certified bargaining representative of the employees in the above-described unit.

6. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with United Mine Workers of America, AFL-CIO.

Recommendations

It is recommended that the Board:

1. Overrule Employer's Objection 3.
2. Certify United Mine Workers of America, AFL-CIO as the collective-bargaining representative of Respondent's employees in the above-described unit.
3. Find that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the certified bargaining representative (UMW).